

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

DAWIN BRITO,

Defendant.

ORDER

15 Cr. 749 (PGG)

13 Cr. 154 (PGG)

PAUL G. GARDEPHE, U.S.D.J.:

The Defendant is charged in two separate indictments. In 13 Cr. 154 – originally assigned to Judge Sweet – the Defendant pled guilty to conspiracy to steal government funds, in violation of 18 U.S.C. § 371, and theft of government funds, in violation of 18 U.S.C. § 641. (13 Cr. 154, Aug. 6, 2013 Plea Tr. (Dkt. No. 27) at 19, 21; id., Order Accepting Plea (Dkt. No. 44)) The Defendant absconded after entering his guilty plea in 13 Cr. 154, and remained a fugitive for eight years. On October 30, 2015, in 15 Cr. 749, the Defendant was charged with bail jumping, in violation of 18 U.S.C. §§ 3146(a)(1) and (b)(1)(A)(ii). (15 Cr. 749, Indictment (Dkt. No. 2)) 13 Cr. 154 and 15 Cr. 749 were reassigned to this Court after Judge Sweet’s death. (13 Cr. 154 (Dkt. No. 96); 15 Cr. 749 (Dkt. No. 7)) Sentencing in both matters is scheduled for August 1, 2023.

In its sentencing submission, the Government contends that the theft of government funds charges in 13 Cr. 154 should be “grouped” with the bail jumping charge in 15 Cr. 749 for purposes of calculating the Defendant’s sentencing range under the United States Sentencing Guidelines. (See Govt. Ltr. (Dkt. No. 21) at 3-4) The Government further contends that, after application of the grouping rules, the Defendant’s Guidelines range is 51 to 63 months’ imprisonment. (Id. at 1)

The Probation Department's Presentence Investigation Report ("PSR") in 13 Cr. 154 has not been updated since it was issued in December 2013. The PSR for 15 Cr. 749, dated May 2, 2023, and revised on May 30, 2023 (Dkt No. 17), does not address application of the Guidelines' grouping rules, and does not make a sentencing recommendation as to the underlying theft of government funds charges. (See PSR at 17-18 (recommending a 12 month sentence on the bail jumping charges "to be served consecutively to Dkt. 13 Cr. 154"))

On January 27, 2014, Judge Sweet issued a Sentencing Opinion in 13 Cr. 154. (13 Cr. 154 (Dkt. No. 54)) Judge Sweet's sentencing opinion and Guidelines calculations are now outdated, however, because the Defendant's failure to appear for sentencing and the subsequent bail jumping charge have important ramifications under the Sentencing Guidelines. In particular, in 13 Cr. 154 – as a result of his bail jumping – the Defendant is now subject to a two-level obstruction of justice enhancement pursuant to U.S.S.G. § 3C1.1. See also U.S.S.G. § 2J1.6 App. n.3 ("[T]he failure to appear is treated under § 3C1.1 . . . as an obstruction of the underlying offense."). Moreover, acceptance of responsibility credit may be denied where a Defendant has absconded. See United States v. Loeb, 45 F.3d 719, 722 (2d Cir. 1995) ("It is well-established that by willfully failing to appear for sentencing, a defendant fails to accept responsibility for the offense, regardless of whether there was a plea agreement stipulating credit for the adjustment.") (citing United States v. Rivera, 954 F.2d 122, 124 (2d Cir.), cert. denied, 503 U.S. 996 (1992))

Given these circumstances, a revised PSR must be prepared for both 13 Cr. 154 and 15 Cr. 749 that includes the proper Guidelines calculation and a sentencing recommendation for both sets of charges.

Accordingly, sentencing is adjourned to **August 28, 2023 at 3:00 p.m.** in Courtroom 705 of the Thurgood Marshall United States Courthouse, 40 Foley Square, New York, New York. The Probation Department is directed to submit a revised PSR by August 14, 2023. The revised PSR should, inter alia, indicate whether the charges against the Defendant should be “grouped” under the Guidelines. See United States v. Kirkham, 195 F.3d 126, 131 (2d Cir. 1999). The parties will submit letters to the Court indicating whether they have any objections to the Probation Department’s revised Guidelines calculations and recommendation by August 21, 2023.

Dated: July 31, 2023
New York, New York

SO ORDERED.

A handwritten signature in cursive script, reading "Paul G. Gardephe", written in black ink. The signature is fluid and stylized, with the first letters of the first and last names being capitalized and prominent.

Paul G. Gardephe
United States District Judge